

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:)
) CA No. 01-12257-PBS
PHARMACEUTICAL INDUSTRY AVERAGE)
WHOLESALE PRICE LITIGATION) Pages 1 - 38
)

MOTION HEARING (JOHNSON & JOHNSON)

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
July 12, 2010, 10:35 a.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
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1 A P P E A R A N C E S:

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P R O C E E D I N G S

THE CLERK: In Re: Pharmaceutical Industry Average Wholesale Price Litigation, Civil Action 01-12257, will now be heard before this Court. Will counsel please identify themselves for the record.

MS. CONNOLLY: Good morning again, your Honor. Jennifer Connolly from Hagens Berman Sobol Shapiro on behalf of the class plaintiffs.

MR. WEXLER: Ken Wexler, your Honor, from Wexler Wallace for the class plaintiffs.

MR. NOTARGIACOMO: Ed Notargiacomo, your Honor, for the class plaintiffs.

MR. SCHAU: Andrew Schau, your Honor, from Covington & Burling for Johnson & Johnson. And let me just add as a footnote, that's the first time I've ever said that in open court. I changed law firms a couple of weeks ago.

THE COURT: I forget, which firm were you with?

MR. SCHAU: I was at Patterson Belknap, your Honor.

THE COURT: Congratulations on your career switch.

So there's been some confusion in my office, and I guess with me -- the buck stops here -- as to what exactly we're doing with Johnson & Johnson because Johnson & Johnson had requested that we defer this until the class rep issue had been satisfied. So maybe you give me a sense of the class rep, what possible issues might come up, and whether it's worth

1 having an argument on the underlying motions or whether I
2 should wait.

3 MS. CONNOLLY: I believe both parties are prepared
4 today to argue the underlying motions and that we should go
5 ahead doing that because we provided a preliminary proffer from
6 counsel when we moved to add the new class rep, Ms. Austed; and
7 that set forth basically, you know, that she is a Medicare
8 Part B participant, that she had some supplemental insurance,
9 but it didn't cover all of her payments, she took Remicade. We
10 have been in the process of gathering her documents. We did
11 see your electronic order this morning giving us a deadline to
12 provide those, and we do intend to give them over to the
13 Johnson & Johnson defendants. So my suggestion, your Honor,
14 would be that we have oral argument on these motions.

15 THE COURT: A lot of times you've thought you had a
16 great class rep, and it hasn't sort of played out. Have you
17 personally looked at these documents?

18 MS. CONNOLLY: We have looked at the documents that
19 go -- I personally have not, but my co-counsel have looked at
20 the documents. The issue has been going back as far as we need
21 to go in order to satisfy Johnson & Johnson that she has got
22 coverage throughout the class period, and that has been a
23 little more difficult. We needed to subpoena United Healthcare
24 to get those records, so that has been the delay.

25 THE COURT: I don't understand what you just said.

1 What do you mean? Why does she have to have coverage
2 throughout the class period? Have I ruled that? I don't
3 think --

4 MS. CONNOLLY: Not through the entire class period.
5 We have documents from 2003, 2004, 2005. We've always wanted
6 to have --

7 THE COURT: Oh, so the issue is whether it predates
8 the key period of time?

9 MS. CONNOLLY: Yes, yes. We have information that
10 she's been taking the drug that long, but we don't have the
11 claims data yet because we're waiting for her insurer for that.

12 THE COURT: So that she's in my what we've been
13 calling the period of time where it's the heartland period.

14 MS. CONNOLLY: That's correct.

15 THE COURT: Before the effective date of the passage
16 of the Medicare Modernization Act.

17 MS. CONNOLLY: That's right.

18 THE COURT: And so that's what you don't have yet?

19 MS. CONNOLLY: That's right.

20 THE COURT: And you have her say-so?

21 MS. CONNOLLY: Yes.

22 THE COURT: So what might be the problem then that
23 would hold this up?

24 MR. SCHAU: Your Honor, I can't answer your question
25 about what information she has. In my conversations with

1 Mr. Macoretta, he has advised me that they have medical records
2 showing payments after 2004. And you'll recall that you
3 granted summary judgment in Class 1 for 2004 forward based on
4 the passage of the MMA. He said they were seeking to gather
5 evidence that she took --

6 THE COURT: Like, does she span at all the -- I don't
7 remember. We just had this debate in this other context. Do
8 you remember what the effective date --

9 MR. SCHAU: Yes, my recollection is that your summary
10 judgment opinion granted summary judgment, I think the phrase
11 is "for the period 2004 forward." You will recall that the MMA
12 took effect at the beginning of 2004. There was a one-year
13 transition where 85 percent of the AWP was paid, and then the
14 ASP system kicked in; and during that one year, we were
15 reporting ASPs so that the government could, you know, learn to
16 process that data and we could learn to report it.

17 THE COURT: So, so far, you only have medical records
18 from 2004 forward?

19 MR. SCHAU: At this point I have no medical records.
20 I have Mr. Macoretta's representation that such records exist
21 in the post-2004 period. I'm not here to question that
22 representation, but I have no medical records.

23 THE COURT: And so let's assume that's true and we
24 also have her under oath that she took some of the drugs before
25 that.

1 MR. SCHAU: We have nothing under oath from her. We
2 have Mr. Macoretta's account of his telephone conversation with
3 her. And let me emphasize, I don't mean to suggest for a
4 moment that Mr. Macoretta is misrepresenting anything. What I
5 am saying is that I think before your Honor can approve her as
6 a class rep, they need to satisfy their burden of proof that
7 she took Remicade during the class period.

8 THE COURT: I agree with that actually, but let me
9 just say this. Let's suppose -- you think you can get the --
10 she's told you that she was taking it during this period of
11 time?

12 MS. CONNOLLY: That's right.

13 THE COURT: And so why does -- sorry, I'm just not
14 back in this mode. So you're saying United. Why would United
15 matter?

16 MS. CONNOLLY: Because she was partially covered for
17 her co-payments by insurance, so they have all the records
18 going back further. She maintained the records back to 2004,
19 but she just doesn't have copies in her files going back
20 further than that.

21 THE COURT: Sure. And she's saying that she wasn't
22 completely compensated? That's how she has a monetary stake in
23 it?

24 MS. CONNOLLY: That's right.

25 THE COURT: So she's part of Class 2, is that it?

1 MS. CONNOLLY: Class 1.

2 THE COURT: Class 1.

3 MS. CONNOLLY: That's all that remains for the J&J
4 claims.

5 THE COURT: So, all right. Now, suppose -- do you
6 feel confident enough -- I was unsure walking in here today
7 what I was going to hear because I got no little play-by-play
8 on class rep status. Is it worth it today -- I have not
9 prepared -- I've read them a long time ago -- I've not prepared
10 for motion for summary judgment because I thought we were going
11 to be having an argument about class reps. I guess that's --
12 you feel confident enough that you're going to be able to get
13 those records and that it will prove it up that she has a
14 monetary stake?

15 MS. CONNOLLY: Yes, your Honor. We've actually been
16 working with counsel for United Healthcare. They have the
17 records literally ready to send. They just have to process the
18 subpoena, and they can get those records to us.

19 THE COURT: And they've read them to you on the phone?

20 MS. CONNOLLY: No, they haven't. They aren't
21 authorized to do that for HIPAA concerns.

22 THE COURT: Oh, they can mail them to you, but they
23 can't tell you what they say?

24 MS. CONNOLLY: Well, they have them queued up, I guess
25 is the way to put it, and then they want the subpoena, and then

1 they can send them to us.

2 THE COURT: Well, you're both here, so maybe we do the
3 argument now, or we can wait till you -- I mean, you made such
4 a big plug, and I'm not prepared to just kick this over forever
5 if in fact it looks very likely.

6 MR. SCHAU: I can't comment on whether it's likely,
7 obviously. I'm prepared to argue the motion if you're prepared
8 to hear it.

9 THE COURT: Well, let me just ask you this: Assume
10 for a minute that the records from United prove up that she
11 took the drug and was not fully compensated, so she has a
12 monetary stake in the outcome of the case, does she serve,
13 unless there's something very weird like she's got Alzheimer's
14 or something, does she otherwise become an appropriate class
15 representative?

16 MR. SCHAU: As I stand here now, I could not give you
17 a different reason why she would not be adequate.

18 THE COURT: Okay, so then maybe we should proceed.

19 MR. SCHAU: Okay. May I make one suggestion on your
20 order this morning?

21 THE COURT: Yes.

22 MR. SCHAU: I don't know what "forthwith" meant in
23 terms of supplying these records forthwith, but our response to
24 whatever they provide us is due the 21st. That may be a little
25 aggressive on the schedule because we don't know when the

1 records will be coming in from United.

2 THE COURT: Do you want to make it two weeks --

3 MR. SCHAU: Could we make my response due perhaps, you
4 know, 15 or 20 days after we get the records rather than --

5 THE COURT: Yes. That makes total sense.

6 MR. SCHAU: Okay.

7 MS. CONNOLLY: That's fine with us, your Honor.

8 THE COURT: But when are you going to get the records?
9 Like, you expect them --

10 MS. CONNOLLY: I've been told that it should be very
11 quick, that they have them all prepared, they've done the
12 search. They're just processing the subpoena in the legal
13 department. That's what I've been told.

14 THE COURT: Okay. The only reason I say that is, I'm
15 very eager to finish the Johnson & Johnson piece of it. And I
16 lose my wonderful law clerk who's been doing this for two
17 years, and I want it done by the end of the summer. That is
18 the key here is to finish this piece of it by the end of the
19 summer. So that's why I'm inclined to hear argument today on
20 Johnson & Johnson; and I am inclined, based on what she said,
21 unless, as I said, the documents don't prove up any monetary --
22 you know, like, let's say she was fully compensated and they
23 don't prove up what she remembers -- I'm inclined to say she's
24 an adequate class representative.

25 MR. SCHAU: Yes, the problem that we've encountered in

1 the past is not that they haven't paid money but that they
2 haven't paid money based on a percentage of AWP, and that --

3 THE COURT: Oh, that's a good point.

4 MR. SCHAU: And that can be difficult to ascertain.
5 It does require some analysis of the records. And, again, I
6 don't want to suggest that she's inadequate because I don't
7 have enough information to tell you one way or the other, but
8 it will require some analysis.

9 THE COURT: I know you're going to think I've
10 forgotten everything -- I probably have -- but why if she's in
11 Medicare and it's only Class 1 -- so we know she has paid a
12 percentage based on AWP, and you're saying United sometimes
13 will just pay a flat amount?

14 MR. SCHAU: When they have Medigap insurance, they
15 sometimes pay a flat co-pay, which would not be tied to AWP. I
16 don't know the facts.

17 THE COURT: So that the Medigap will pay for the whole
18 thing, but she would only pay for, like, 25 bucks per
19 prescription, something like that?

20 MR. SCHAU: Yes, again, I don't know her situation,
21 but we have encountered in the past situations where people who
22 claim to be in Class 1 actually were only making flat
23 co-payments.

24 THE COURT: Have you asked that? Does she remember?

25 MS. CONNOLLY: We have. She believes they have been

1 percentage co-payments.

2 THE COURT: Does United -- that should be just
3 actually right out of the policy. That should be simple enough
4 to figure out.

5 MS. CONNOLLY: That should come with all the documents
6 that we have requested from them. They haven't made a
7 representation to us otherwise.

8 THE COURT: Well, but we should be able to know -- I
9 guess the bottom-line inquiry is, do you want to argue the
10 motions today because you're here and you're prepared? And
11 then if it turns out -- I'm not going to write a huge, massive
12 summary judgment motion if she's only paying flat payments.
13 That's the thing. It's a chicken-and-egg thing. I think, once
14 you're here, you might as well argue it. We'll get the
15 transcripts. But I need to not spin my wheels and waste my
16 time on something if -- you should be able to figure that out,
17 like, instantly. Can you call the lawyer for United and just
18 find out?

19 MS. CONNOLLY: They're very hesitant to tell us --

20 THE COURT: No, no, no, it can't be private
21 information whether she's paying a flat pay or a percentage.
22 Should we just have a hearing next week and subpoena him in?
23 It's just got to be simple. Why are you saying it's so hard?

24 MR. SCHAU: It's based on experience, your Honor.
25 When you get these medical records, sometimes they're easy to

1 interpret; sometimes they're not so easy to interpret. I don't
2 know what her medical records will show, and I just don't want
3 to --

4 THE COURT: What I don't want, my selfishness, because
5 I keep granting these motions and granting these motions, is,
6 I don't want to lose my law clerk before he is able to give his
7 expertise to helping me on this motion, just because it's the
8 summertime and living is easy and where no one gets to figuring
9 out whether it's a flat co-pay or not. I mean, so that's my
10 problem.

11 MR. SCHAU: Let's put a pin on that issue then and go
12 ahead and argue the motion.

13 THE COURT: I think so. But I also want to know.
14 Within a week, I should be able to know, is it a flat co-pay or
15 not? You should be able to just write me a -- because I don't
16 want to expend the resources, law clerk resources, if it turns
17 out that there's going to be a mess over class rep.

18 MS. CONNOLLY: We'll provide you a status report, your
19 Honor. We'll look into it right away when we get back.

20 THE COURT: Can you do it in a week?

21 MS. CONNOLLY: We'll try, so --

22 THE COURT: I don't want a brief. I'm not trying to
23 do that.

24 MS. CONNOLLY: I know, I know you don't.

25 THE COURT: Just like "yes" or "no" if it was a

1 percentage or not, she has a -- we're able to say in good faith
2 it was a -- and then if you are, we'll move ahead and write
3 this up. Fair enough?

4 MS. CONNOLLY: That's fair.

5 MR. SCHAU: Fair enough.

6 THE COURT: Okay, thank you.

7 Okay, you're the moving party.

8 MR. SCHAU: Thank you, your Honor. I'm actually here
9 to argue two summary judgment motions. When we were last in
10 front of you on October 8, you made clear to us that your entry
11 of judgment in favor of Johnson & Johnson for Class 1 was
12 intended to only apply to Massachusetts consumers. There was
13 some confusion on our part, I think there was some confusion on
14 plaintiffs' part about that, but that is --

15 THE COURT: I clearly wrote it inappropriately. So I
16 think I just signed off on some order someone gave me, so --

17 MR. SCHAU: Fair enough. As a result of that
18 disclosure from the Court, we have divided our motion for
19 summary judgment into two motions: One is limited to
20 Massachusetts consumers. That may or may not be a formality,
21 depending on your point of view.

22 THE COURT: Fair.

23 MR. SCHAU: But then the second motion relates to
24 consumers outside of Massachusetts.

25 THE COURT: And I now understand because of the

1 Haviland controversy actually the dynamic of this whole thing a
2 lot better because I hadn't -- it was so not a focus, the rest
3 of the country, or even -- it just wasn't a focus at the last
4 hearing. It just wasn't. And so I think the whole thing
5 caught us -- caught me anyway by surprise. So I think it's
6 appropriate to --

7 MR. SCHAU: Let me go back in time a little bit
8 because I'll tell you where this came from, and I think it is
9 relevant to what I'm going to ask you to do today.

10 THE COURT: Okay.

11 MR. SCHAU: Shortly after you issued your liability
12 opinion in June of 2007, you had a status conference with
13 Bristol-Myers Squibb because they were the next up for a
14 Class 1 trial. At that status conference, you indicated that
15 you had intended to apply the 30 percent speed bump to Class 1.
16 We interpreted that, rightly or wrongly, to mean the entirety
17 of Class 1. As a result --

18 THE COURT: Now, this is a status for the Mass. trial?
19 Or just --

20 MR. SCHAU: This is a status conference after you
21 entered your liability opinion.

22 THE COURT: Okay.

23 MR. SCHAU: Mr. Berman had said at one point towards
24 the end of that conference -- you asked him what's left. He
25 said, "We still have Class 1 Johnson & Johnson." You said, "I

1 thought I dismissed Johnson & Johnson." He said, "Yes, but
2 it's not clear that the 30 percent standard applies to
3 Class 1." And you then responded that it did apply to Class 1.
4 For whatever reason, you know, it was our mistake, whoseever, we
5 interpreted that to mean --

6 THE COURT: It was probably mine, but that's fine.

7 MR. SCHAU: -- you were prepared to enter a judgment
8 for Class 1. We submitted to you a form of judgment that did
9 that. You signed that judgment.

10 Mr. Berman and the rest of class counsel did not
11 appeal the entry of judgment against Classes 1, 2, or 3.
12 Mr. Haviland did, only with respect to Classes 1 and 3.

13 You then disqualified Mr. Haviland. The appeal he had
14 noticed was then taken over by Mr. Berman's firm and the other
15 class counsel. They presented a Class 1 argument in the First
16 Circuit, and the First Circuit remanded and asked for
17 additional explanation from you.

18 THE COURT: Right. Okay, thank you.

19 MR. DALY: So that brings us up to October 8 of last
20 year when we were before you on a status conference, and I
21 indicated to you at that time that I thought you could resolve
22 the Johnson & Johnson issues on summary judgment. You
23 encouraged us to mediate the case in front of Mr. Green. We
24 did that without success, so we are now back, having briefed
25 the argument for summary judgment. And, of course, we had the

1 detour along the way of the then class reps withdrawing, but,
2 in any event, aside from the question of whether Ms. Austed is
3 an adequate class rep, we're here.

4 And, as I said, we've divided our motion into two
5 parts based on what we learned, but I think at core, the same
6 arguments that compel summary judgment in Massachusetts also
7 compel summary judgment in the rest of the United States. And
8 let me first, if I can, identify for you the material
9 undisputed facts that we think should result in summary
10 judgment.

11 First and foremost, plaintiffs have conceded that
12 spreads of up to approximately 30 percent are not fraudulent or
13 inflated. They are untainted, if you will, by the AWP scheme.
14 That is Dr. Hartman's words.

15 The second undisputed fact is that the government, not
16 just private payors but the government -- and by the
17 government, I mean Congress and Medicare -- set the
18 reimbursement rate for Part B medications with the expectation
19 that spreads would not exceed approximately 30 percent. So the
20 30 percent spread idea is baked into the reimbursement formula
21 as set by the government.

22 The third undisputed fact, of course, is that Remicade
23 and Procrit, the two drugs at issue for Johnson & Johnson, both
24 had spreads of no greater than approximately 30 percent, and,
25 in the case of Procrit, it was almost always below 25 percent.

1 And the crux of the point that I want to make today is
2 the next undisputed fact, and that is that Class 1 consumers
3 never heard of AWP and had no idea how it was that their
4 co-payments were calculated by the government. And that's key
5 because that differentiates Class 1 from both Classes 2 and 3.
6 Both Classes 2 and 3 themselves were involved in -- well, I
7 should say at least Class 3 themselves were involved in setting
8 the reimbursement rate that they paid. So what they understood
9 about AWP, their expectations, to adopt Dr. Hartman's
10 formulation, informed the formulas that they wrote down on
11 paper and they paid. That is not so for Class 1. Class 1
12 never heard of AWP; they had no idea how their reimbursement
13 was calculated.

14 So Class 1 never made a decision that hinged on their
15 understanding of AWP or their lack of understanding of AWP.
16 They were completely divorced from it, and that raises the
17 question of whose expectation matters for Class 1: Is it the
18 absence of expectation by Class 1, or is it the full
19 understanding on the part of the government that set the
20 reimbursement rate that matters? And I submit to you that the
21 only rational expectation that one needs to look at in order to
22 determine liability for Class 1 are the expectations of the
23 government when they set the reimbursement rate because their
24 expectations mattered. They were capable, in your words, of
25 being duped by mega-spreads. They were capable of overpaying

1 themselves, and then, incidentally, so too would the
2 beneficiaries, by companies that set the spread in a way that
3 was outside of their expectations. But if you didn't dupe the
4 government, then nobody overpaid; and we have a concession here
5 undisputed that the government understood 30 percent spreads
6 when they set the reimbursement rate.

7 THE COURT: Where does that come from again?

8 MR. SCHAU: We have that from Dr. Hartman, both in
9 testimony and in his reports, his Class 1 and 2 reports, and we
10 have that -- well, basically from Dr. Hartman. And let me just
11 quote to you a couple of --

12 THE COURT: Well, I think the Department of Justice --

13 MR. SCHAU: Well, we also have the Department of
14 Justice, not part of this record necessarily, but them having
15 signed on, if you will, to the Schering settlement, for
16 example, which --

17 THE COURT: Do you know if they've taken the -- I
18 believe somewhere in this court the Department of Justice may
19 have taken the position that they were not challenging the
20 30 percent speed bump, but I can't remember exactly in what
21 context.

22 MR. SCHAU: I believe they've done that in a few
23 places. They've done it, I believe, in briefing of the Dey
24 case. And forgive me, I'm not as familiar with the Ven-A-Care
25 record as perhaps I should be. It's not something I get paid

1 to follow, but I believe that they have, in the context of the
2 Ven-A-Care cases, said they accept your liability analysis in
3 the 30 percent.

4 THE COURT: I believe that's true. I don't remember
5 whether it was in the context of settlement or national court
6 pleadings, and we will look at that. And I would ask if you
7 could have one of the people at Covington, your minions maybe
8 just flip through and see if you can find it. But I believe
9 that that is the case. But let's assume for a minute it is the
10 case, what weight do I give that?

11 MR. SCHAU: I can give you a couple of examples where
12 I know they said something very similar. One is, if you'll
13 recall, when Schering settled in the Ven-A-Care case, they
14 asked you for absolution on their branded drugs, and so that
15 they were only settling on albuterol, their generic inhalant.
16 In that context, they presented to your Honor an analysis of
17 their branded drug showing that by and large they were
18 underneath the speed limit, and the government signed off on
19 that settlement. That was a settlement between Ven-A-Care and
20 Schering, but Schering required as a condition --

21 THE COURT: I don't know that I can take that as an
22 admission in court, so if you find something --

23 MR. SCHAU: They filed a piece of paper that said
24 that.

25 THE COURT: Maybe, but that's a settlement. I'm just

1 wondering if there was any other statement of facts or anything
2 like that. So if you see anything, I'd appreciate just a
3 little something.

4 MR. SCHAU: Yes, we'll make a point of looking for
5 that.

6 THE COURT: All right, so let's assume for a minute,
7 though -- because it does ring a bell -- that the government
8 has conceded it's a 30 percent speed bump, and industry has
9 conceded it's a 30 speed bump, but consumers didn't know. Now,
10 I came to a certain legal conclusion in Massachusetts that it
11 doesn't rise to the standard of rascality, if you will. But
12 the problem I ran into in a national class, which either I made
13 a mistake by moving too quickly -- I don't remember -- or I
14 just misread something, but what I didn't think through, if
15 there's a state standard that didn't rise to the level of
16 rascality, if you will --

17 MR. SCHAU: Well, let me put a pin on that "rascality"
18 term, only because you did decide Massachusetts under the more
19 liberal Section 9 of Chapter 93A as opposed to under Section 11
20 which requires rascality. But be that as it may, I think the
21 fundamental question to think about in deciding whether to
22 grant Johnson & Johnson's motion is whose expectation matters.
23 From a causation vantage point, think of it this way: If the
24 consumer had no idea how the co-payment was calculated, the
25 consumer had no opportunity, if you will, to say yes or no,

1 "I'll pay that amount," because they weren't basing their
2 decision to make a payment on an expectation as to the
3 relationship between selling prices and AWP.

4 THE COURT: Well, I can't hinge it on their
5 expectations because they --

6 MR. SCHAU: Exactly.

7 THE COURT: No, no, but --

8 MR. SCHAU: They had no expectations, and that's
9 undisputed.

10 THE COURT: No, but the flip side of it is, if this is
11 unfair and deceptive with respect to the government, they're
12 the victims.

13 MR. SCHAU: Exactly right. And it wasn't unfair and
14 deceptive as to the government unless you qualify as a
15 mega-spread, because it's admitted in this record, in the
16 expert reports, in testimony, that the 30 percent expectation
17 applied to both Medicare and Congress. And if you'll recall --

18 THE COURT: So you're basically saying, unless it
19 was -- have you looked at all the state statutes? Are there
20 any that would not have this -- they're all mini-FTC statutes,
21 so most of them look like this but not all of them, and that's
22 the concern I had and I needed the summary judgment on.

23 MR. SCHAU: Well, we do in great detail go through the
24 state statutes in these briefs, and I will tell you that if we
25 have to do that at this oral argument, I will fail you because

1 there's a lot of states out there, but --

2 THE COURT: Are there any that struck you as a looser
3 standard?

4 MR. SCHAU: No. Here's the point.

5 THE COURT: By "looser" I mean -- I didn't mean
6 looser. Actually, I probably meant a different statute that
7 might capture this.

8 MR. SCHAU: Sure. When you certified Class 1
9 nationwide, a predicate of your decision to certify the class
10 was that there were, quote, "no material differences" or that
11 the differences were "unlikely to be material," I should say --
12 that was your phrase -- in terms of the different state
13 statutes. Had you concluded the other way, I don't think you
14 would have certified the class nationwide because then you
15 would have had genuine state-by-state problems in crafting a
16 verdict form, in figuring out how one jury could decide
17 liability under materially different state statutes. So in
18 certifying a nationwide class, you were persuaded by plaintiffs
19 that there were no significant material differences among the
20 state statutes.

21 THE COURT: And I carved out a bunch of states, right?
22 So we're only --

23 MR. SCHAU: You carved out those that did not permit
24 class actions.

25 THE COURT: And did I carve out any others? I thought

1 there were some that --

2 MR. SCHAU: No. There have since been some
3 concessions that under some states even plaintiffs agree they
4 can't make a claim. For example, Utah requires that the
5 conduct at issue have already been adjudicated unlawful in
6 order for a consumer to state a claim.

7 THE COURT: I see.

8 MR. SCHAU: But those are the exceptions. From a
9 big-picture vantage point of view, there are no material
10 differences. And in fact at one point you specifically
11 inquired of Mr. Sobol and Mr. Berman, "Who has the broadest
12 consumer protection statute in the country?" And they
13 unequivocally told you it was Massachusetts, and that's quoted
14 in our papers. At one point you said then, "Even California?"

15 THE COURT: I was just about to make the same comeback.

16 MR. SCHAU: You said, "Even California?" And the
17 answer was, "Yes, your Honor, even California."

18 Now, California is out of this case for a different
19 reason, as you'll see in our brief, but I think you can be
20 comfortable, based on your analysis on the class certification
21 motion, and the representations you've received from class
22 counsel, and the fact that you decided the case under Section 9
23 of Chapter 93A, the more lenient provision, that you will not
24 be disadvantaging any citizen of any state based on a legal
25 difference in what the plaintiff needs to prove.

1 THE COURT: And how many of those states -- another
2 issue that came up was, of course, to the extent I certified it
3 and would have done a bench trial on all of them, I said what I
4 said; but to the extent it was a jury call, how many of them
5 are jury calls?

6 MR. SCHAU: Sure. I think the count on that is,
7 there's no jury in Illinois, Nebraska, New Hampshire.

8 THE COURT: Say it again. Illinois? Go ahead.

9 MR. SCHAU: Illinois, Nebraska, New Hampshire, North
10 Carolina, and one of the two provisions at issue in --

11 THE COURT: Somebody coughed. I didn't hear you. So
12 North Carolina.

13 MR. SCHAU: North Carolina and one of the two
14 provisions in California. There's a second provision in
15 California that they can't satisfy --

16 THE COURT: So the rest of them are jury. So I
17 suppose the issue would be: Regardless of what you say, Saris,
18 a jury might want to disregard the speed bump and be able to
19 find that because it was significantly higher than the actual
20 cost, that that's an unfair practice.

21 MR. SCHAU: I think, as a practical matter, that can't
22 happen, and the reason for that is, from the very get-go, from
23 the expert reports on Class 1 liability submitted by the
24 plaintiffs, there has been an admission that the government
25 understood and expected spreads up to 30 percent when it set

1 the reimbursement rate. So the only question that leaves, I
2 submit to you, is a completely legal question, and that is
3 whose expectation matters, okay? There's no dispute on the one
4 hand that consumers had no expectation, no fact dispute.
5 There's no dispute on the other hand that the government
6 expected spreads of up to 30 percent. Again, no factual
7 dispute. So we have two pillars, neither of which is disputed.

8 The question, and I submit to you it's a legal
9 question, is whose expectation matters.

10 THE COURT: Okay, thank you. All right.

11 MS. CONNOLLY: The way we look at this argument, your
12 Honor, is basically that it breaks down into two components,
13 and the first component is for the state statutes that require
14 a jury trial, which is the vast majority of state statutes that
15 we're talking about today. On those states, we believe that,
16 first of all, the jury would be entitled to decide disputed
17 issues of fact.

18 The way that you reached whether something was unfair
19 in the bench trial was, as you'll recall, there were three
20 factors that you considered. One of those and the most
21 pronounced of those was your adoption of Dr. Hartman's
22 30 percent benchmark. We believe that a jury, properly
23 instructed on the law of what constitutes unfair, could decide
24 to use different factual factors. That is what the First
25 Circuit has held in the Incase decision.

1 THE COURT: In the what case?

2 MS. CONNOLLY: Incase, I-n-c-a-s-e.

3 THE COURT: What's that? Is that a 93A case?

4 MS. CONNOLLY: No. It was just a decision in which
5 the First Circuit held that it was the jury's role to weigh the
6 factual nature of the claim as opposed to the legal nature of
7 the claim. It's cited in both J&J's --

8 THE COURT: So what are the fact disputes here? And I
9 need to go find it myself, but I had thought that the Justice
10 Department has now agreed that they knew that there was a
11 spread of up to 30 percent. It's possible that you're going to
12 need to take -- I don't know if that is something that's
13 binding. It's part of the MDL, which is fine; I'm a MDL judge.
14 I don't know whether it's binding on you because the class is a
15 separate party. But assume for a minute that that -- have you
16 followed that?

17 MS. CONNOLLY: I'm not sufficiently up to speed on
18 that, your Honor.

19 THE COURT: I think you both need to look a little bit
20 at that and maybe talk to the lawyers in it. And it may be
21 taking you by surprise, which I don't mean to do. We have to
22 go refresh our memories too of it, but I do believe in
23 general -- I know it's true for settlement, but I think it's
24 beyond settlement -- they haven't challenged a government
25 knowledge defense of up to 30 percent. You know, it's come up

1 in that context, the defense there. So if that's so, if the
2 government knew and industry knew and that's undisputed, what
3 factors would a jury look at for spreads under 30 percent to
4 say it was unfair and deceptive?

5 MS. CONNOLLY: Well, the jury could do a variety of
6 things. First of all, your Honor, just to be clear, regardless
7 of the position the government takes on the 30 percent spread,
8 it is our position, as Mr. Schau stated, the fundamental
9 dispute here is whose knowledge matters; and it's our position
10 that regardless of the government's knowledge, that Class 1
11 didn't know, and that justifies the --

12 THE COURT: But everyone agrees on those facts, so
13 they're not disputed. So, I mean, everyone agrees, I mean, no
14 consumer knew about AWP.

15 MS. CONNOLLY: That's right.

16 THE COURT: He's conceding that point, so no one knew
17 about any spreads. No one even heard of the term probably.
18 And then we have the government that knew and industry that
19 knew. And in a way, you're in a awkward position because
20 you're arguing against a little bit the position that's
21 consistently taken before, but you need to -- it doesn't sound
22 like there are any disputed issues of fact. That's what I'm
23 searching for here.

24 MS. CONNOLLY: The one disputed issue of fact that we
25 have put in our summary judgment motions is, as you recall,

1 there was significant evidence at trial through the Dooley
2 memos and otherwise that J&J concealed, actively concealed its
3 conduct from the government, that it didn't want pricing
4 surveys, that it didn't want its true prices known. We think
5 those factors are relevant factors that a jury would consider
6 in deciding whether the government did truly know.

7 For example, there wasn't evidence at trial that the
8 jury knew that Johnson & Johnson was setting Remicade
9 automatically at 30 percent of WAC. Recall, that was that
10 unusual drug with J&J where we had testimony at trial that they
11 had set -- unlike most of the drugs at issue in this litigation
12 that were set at 20 to 25, Remicade was set at 30 percent. And
13 that's why you held when you were looking at damages for
14 Remicade that it was a close call. And the First Circuit
15 seized on your language in looking at entering judgment in
16 favor of Johnson & Johnson and against Class 1 saying that if
17 there is a close call to be had here, it's really a jury
18 question and probably not something appropriate for summary
19 judgment.

20 THE COURT: So the question that I have is, did you
21 ever take the government's depositions with respect to these
22 drugs?

23 MS. CONNOLLY: There were a number of government
24 knowledge depositions that were taken by the defendants in this
25 case. They really didn't get under way until the Track Two

1 portion of the case, so they never came into play with the
2 Track One portion of the case.

3 THE COURT: So are they part of the record you've
4 given me?

5 MS. CONNOLLY: They are not.

6 THE COURT: Do you think I can legitimately look at
7 the Justice Department's concession in the Ven-A-Care cases?

8 MS. CONNOLLY: I don't think it's a part of a record
9 what's before you here. I also don't think it's legally
10 relevant because --

11 THE COURT: It's legally relevant. Whether it's
12 dispositive, I don't know. If the government says they knew,
13 that certainly goes to whether this is unfair, deceptive,
14 et cetera, if the government knew. It's relevant. Whether
15 it's dispositive, I don't know. But the question is, being an
16 MDL judge, I have a hard time shutting my eyes to it. I think
17 it's true, and I'm just thinking out loud as to whether or not
18 I can consider it, since neither of you have sort of put that
19 in.

20 MS. CONNOLLY: Right. The only thing that is in the
21 record with regard to the government's position was before the
22 First Circuit where the government put in an amicus brief about
23 the plain meaning of AWP, but there was nothing in that brief
24 that related to --

25 THE COURT: Well, as far as I'm concerned, I can do

1 what I want. The First Circuit was asking for more findings,
2 so they weren't, I mean, I don't think -- but the question I
3 really want to know is, can I take judicial notice of, or is
4 this prejudicial to everybody, of what happened in the
5 Ven-A-Care cases with the government -- I don't think the
6 government was specific to Johnson & Johnson, don't get me
7 wrong. I think they just basically conceded a 30 percent speed
8 bump.

9 MS. CONNOLLY: I think that's something where we'd
10 have to look into the nature of the admission and perhaps
11 submit some research on the appropriateness of considering that
12 with this record.

13 THE COURT: Well, I'm thinking of it, but I'm giving
14 you notice. So I think you both should look at that record.
15 And I also have to refresh my recollection as to whether it was
16 in the settlement context, in which case it would not be
17 binding, as opposed to whether it was actually in a government
18 document on it. So you're basically saying that the Remicade
19 situation is the one that you're really pressing for a jury
20 trial on?

21 MS. CONNOLLY: We're pressing for both, but we
22 believe --

23 THE COURT: What's the other drug?

24 MS. CONNOLLY: Procrit.

25 THE COURT: Procrit.

1 MS. CONNOLLY: We're pressing for both, but we admit
2 that the case for a jury is much stronger with Remicade.

3 THE COURT: Because they went right up to the margin?

4 MS. CONNOLLY: Exactly.

5 THE COURT: Okay, thank you. And what would your --
6 so she's raising the fact that there were act of concealment,
7 and I don't remember the evidence well enough to actually go
8 there, but let me ask you this: Is that a disputed issue of
9 fact for purposes of this motion about the act of concealment
10 and that sort of thing?

11 MR. SCHAU: Whether we concealed or didn't conceal I
12 don't think is really disputed because there is an admission
13 that the government knew about spreads of up to 30 percent.
14 Kathy Dooley's memos were talking about spreads of 20,
15 25 percent. You know, a jury could read those memos either
16 way, but at the end of the day, if there's a --

17 THE COURT: So I can take the Dooley memos as a given,
18 and what you're saying is, yes, there's evidence that I have to
19 take in their favor on act of concealment, but it's immaterial
20 because the government understood these were talking about
21 spreads of 20 and 25 percent, not 30 percent?

22 MR. SCHAU: Sure. When you look at the acts of
23 concealment evidence, though, I think the inference you'll draw
24 is that they did not take a price increase for fear that the
25 government would then start focusing on them, as opposed to

1 actively concealing the price of the drug. In fact, I don't
2 know if it's in this record, but CMS has testified that the one
3 company that told them about the First DataBank bump from 20 to
4 25 percent was Johnson & Johnson. We sent somebody down to
5 complain. And I know it's counterintuitive to you that we
6 would do such a thing, but the reason, frankly, is that all of
7 our PBM rebate contracts were based on AWP, so when our drugs'
8 AWPs went up, our rebate obligations to the PBMs went up, so --

9 THE COURT: So you're a victim of both a --

10 MR. SCHAU: The system has conflicting --

11 THE COURT: Is this all over, by the way, yet? Has
12 AWP, has the rollback all happened and that sort of thing?

13 MR. SCHAU: I believe it has.

14 MS. CONNOLLY: That's right.

15 THE COURT: You see almost nothing about it in the
16 paper. I don't get the industry press, so --

17 MS. CONNOLLY: There's still a lot of talk about it in
18 the industry press, your Honor, because the PBMs have attempted
19 to neutralize the rollback, and that's been the new controversy.

20 MR. SCHAU: Yes, remember, since AWP is a benchmark
21 and you're just taking a number, it's like the prime rate. You
22 know, you can negotiate 2 points below the prime rate, and then
23 if they change the prime rate on you, you move it to 1 1/2
24 points --

25 THE COURT: So it has a very blip effect for a brief

1 period of time.

2 MR. SCHAU: I think you very correctly identified the
3 fact that there was a period of time in which retailers got
4 more money and payors paid more money, but the system kind of
5 accommodated that over time.

6 THE COURT: I sort of expected that actually. So I
7 was hearing all this Sturm and Drang about how the world was
8 going to collapse, and I thought, "Hmm, probably not." But
9 anyway, let me do this.

10 MR. SCHAU: May I approach the bench just for one
11 thing. I don't know if you'll find this helpful.

12 THE COURT: You can give it to Mr. Alba. That would
13 be great. Have you seen it?

14 MS. CONNOLLY: Yes, I have. He provided it to me this
15 morning.

16 MR. SCHAU: I tried to create a chart that was more
17 readable that summarized our articulation about the different
18 state standards. I don't know that you'll find that helpful or
19 even need to reach it because, like I said, I think the core
20 issue is whose knowledge matters. But be that as it may, I
21 thought you might find this helpful.

22 THE COURT: Did you file it?

23 MR. SCHAU: It's a visual representation of a chart
24 that's in the brief.

25 THE COURT: I read this without my glasses and thought

1 it was the Utopia comparison. It's the -- anyway, that's not
2 the way it reads.

3 MR. SCHAU: Your Honor can do with it as you will. I
4 just thought it might be --

5 THE COURT: Well, can I say, could you docket it? I
6 think it's really useful. I appear to be one of the few judges
7 in the United States who's actually tried to group these
8 statutes and to analyze them all, and, to the extent it ever
9 comes up again, someone might want to come back through and
10 actually see this. It would be very useful.

11 MR. SCHAU: Sure, we'll do that.

12 THE COURT: In any event, let me just say this: So as
13 this comes down to it, it's really a question of, in the
14 jurisdictions that have a jury trial, where it's clear, I
15 think, that both the government and the industry understood
16 that there was a 30 percent speed bump, consumers, it's
17 conceded, didn't understand anything, had no expectations at
18 all, is there enough evidence for a jury trial where there are
19 certain things like act of concealment underneath the speed
20 bump that could come to a point of unfair and deceptive? And I
21 think we understand what the issue is, and it's particularly
22 close. I don't remember even why I said that, but I'll take,
23 on Remicade, as what I must have said before, on a bench trial;
24 and the question is whether that bootstraps it up to a jury
25 trial in these other jurisdictions. So, I mean, am I right,

1 that's the issue? It's a fairly narrow issue.

2 MS. CONNOLLY: That's right, your Honor.

3 MR. SCHAU: I would be remiss if I didn't tell you one
4 thing.

5 THE COURT: Yes?

6 MR. SCHAU: And that is, in the course of our
7 mediation efforts, we have identified the damages that would be
8 associated with applying a 25 percent speed bump to Remicade,
9 and I don't know that I'm at liberty to disclose that number --

10 THE COURT: No, don't tell me.

11 MR. SCHAU: -- but I think, if they give me
12 permission, I'll tell you because I don't believe you would
13 want to hold a jury trial in that event. I think it would be a
14 waste of the Court's time.

15 THE COURT: Well, let me go off the record just for
16 one minute here because I don't want the exact numbers.

17 (Discussion off the record.)

18 THE COURT: Can we go back on the record. We had a
19 very brief discussion about settlement, and I'm going to ask
20 you to talk, and, if it seems worthwhile, to see Mr. Green
21 again. He's around because he's still doing stuff, great stuff
22 with my cases.

23 And the second thing is, I am considering certain
24 litigation positions taken by the Justice Department, and I
25 don't know what to do with that. It's like the purple elephant

1 in the room where the Department of Justice has agreed to the
2 30 percent speed bump. I don't know what I'd do with that.
3 And maybe you could think about that and file something within
4 a week, does that make sense, to try and figure that out? You
5 haven't been as involved in Dey and Ven-A-Care.

6 MR. SCHAU: No, you know, I -- it drifts across my
7 desk, but I don't --

8 THE COURT: And I juggle so many of these different
9 balls in the AWP litigation, I can't remember whether that was
10 for settlement purpose or for litigation purposes, and I'm
11 going to have to look myself. I suggest you all look and maybe
12 make some phone calls. And I really encourage you, if that is
13 the case, for you to do some serious thinking about trying to
14 settle the case. And I don't want to hear numbers in the way
15 we were talking about, okay? So great. I thank you very much.
16 You all reminded me of all the interesting issues in this case.
17 And I think we should move on to BMS right now, is that right?

18 MR. NOTARGIACOMO: Yes, your Honor.

19 THE COURT: Okay, thank you very much.

20 MS. CONNOLLY: Thank you, your Honor.

21 THE CLERK: Court is in recess.

22 MR. SCHAU: And I'll just docket this as something
23 that was submitted to the Court.

24 THE COURT: Yes, I just think you might want it for
25 the future. It's really useful for people.

1 MR. SCHAU: Okay.

2 MS. CONNOLLY: We have no objection to docketing it.

3 (Adjourned, 11:27 a.m.)

4
5 C E R T I F I C A T E

6
7 UNITED STATES DISTRICT COURT)
8 DISTRICT OF MASSACHUSETTS) ss.
9 CITY OF BOSTON)

10
11 I, Lee A. Marzilli, Official Federal Court Reporter,
12 do hereby certify that the foregoing transcript, Pages 1
13 through 38 inclusive, was recorded by me stenographically at
14 the time and place aforesaid in Civil Action No. 01-12257-PBS,
15 In Re: Pharmaceutical Industry Average Wholesale Price
16 Litigation, and thereafter by me reduced to typewriting and is
17 a true and accurate record of the proceedings.

18 In witness whereof I have hereunto set my hand this 21st
19 day of July, 2010.

20
21
22
23 /s/ Lee A. Marzilli

24 _____
LEE A. MARZILLI, CRR
25 OFFICIAL FEDERAL COURT REPORTER